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The Politics of the Mass Media and the Free Speech Principle[†]

STEVEN SHIFFRIN*

INTRODUCTION

For centuries, liberals have invoked free speech in a wide array of significant causes and hailed it as an important part of their political philosophy. Conservatives, on the other hand, have recognized that free speech is a good thing in moderation and have worried that there might be too much of it going around.

So it was. Conservatives have recently discovered the First Amendment, and they are beginning to like what they see: a banner for corporations seeking to dominate election campaigns,¹ for tobacco companies to hawk their wares,² for shopping centers to exclude demonstrators,³ for media corporations to resist access,⁴ and a club to use against those who seek to regulate racist speech⁵ and pornography.⁶

Conservative victories are not yet monumental, and liberals themselves divide on some of these issues, but it may be time for progressives to reconsider their historic commitment to free speech and press. In a provocative essay, Frederick Schauer takes this moment to promote just such a reevaluation.⁷ Professor Schauer suggests that the free speech principle tends to favor those in power and tilts against those out of power.⁸ In support of this suggestion, he observes that conservative free speech arguments are increasingly being made by wealthy individuals and powerful corporations, and he notes that these arguments have frequently been successful. In attempting to account for this "rightward shift in the political center of gravity

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* Professor of Law, Cornell University. I owe thanks to Kathy Abrams, Greg Alexander, Ed Baker, Sheri Johnson, Tracey Maclin, Seana Shiffirin, and Steve Thel. I also owe thanks to faculty members at the University of Iowa Law School who were generous with their hospitality and provided spirited and thoughtful comments on the media section of this paper.

1. First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

2. For example, Philip Morris purchased the exclusive right from the National Archives to be the official corporate sponsor of the Bicentennial celebration of the Bill of Rights and participated in an extensive advertising campaign that associated its name with the First Amendment. See generally *Tobacco Issues (Part 2): Hearings Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives*, 101st Cong., 1-172 (1989-1990).

3. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

4. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

5. *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992).

6. *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986).

7. Frederick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. COLO. L. REV. 935 (1993).

8. He assumes that those with power and wealth are, in the main, relatively conservative and that those with less power and wealth are, in the main, relatively liberal.

of free speech argumentation,"⁹ Schauer resorts to a philosophical explanation buttressed by a technological observation. The observation is that entry into the intellectual marketplace is increasingly costly, and that any sustained effort to bring about attitudinal changes requires the kind of substantial resources enjoyed by powerful people. The philosophical explanation is that a market unregulated by government will be a market dominated by powerful social and economic forces. From these premises, he suggests that liberals should entertain second thoughts about embracing the free speech principle.

Professor Schauer is not alone. Other important scholars, including those who identify with progressive causes, have themselves begun to question the political tilt of the free speech principle. Jack Balkin has pointed to an "ideological drift"¹⁰ in the political valence of the First Amendment. He suggests that what once "was sauce for the liberal goose increasingly has become sauce for the more conservative gander."¹¹ Although Mary Becker particularly focuses on the negative consequences of the First Amendment for women, she makes the more general argument that abstract rights like freedom of speech protect the powerful and work against other disadvantaged groups.¹² Richard Delgado and Jean Stefánic maintain that First Amendment doctrine is equipped to handle "small, clearly bounded disputes,"¹³ but is "less able . . . to deal with systemic social ills, such as racism and sexism, that are widespread and deeply woven into the fabric of society. . . . Free speech, in short, is least helpful where we need it most."¹⁴ Morton J. Horwitz argues that rights discourse in free speech cases underlines its "continuing ability . . . to preserve the privileges of the rich and powerful."¹⁵ David Kairys argues that the Court "has narrowed and restricted the free-speech rights available to people of ordinary means [and] enlarged the free-speech rights of wealthy people and corporations."¹⁶ Finally, Mark Tushnet maintains that the First Amendment has replaced the Due Process Clause as the "primary guarantor of the privileged."¹⁷

Of course, the general claim that rights rhetoric, including the right of free speech, does not serve the left has been much discussed in the academy. A number of critical theorists have pointed to the disadvantages of rights, though some have stopped short of recommending the abandonment of rights discourse. Recurring themes include the contention that rights are

9. Schauer, *supra* note 7, at 942.

10. J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383.

11. *Id.* at 384.

12. Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights,"* 59 U. CHI. L. REV. 453 (1992) [hereinafter Becker, *Politics*]; see also Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993) [hereinafter Becker, *Conservative Free Speech*].

13. Richard Delgado & Jean Stefánic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 CORNELL L. REV. 1258, 1259 (1992).

14. *Id.*

15. Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393, 398 (1988).

16. DAVID KAIRYS, WITH LIBERTY AND JUSTICE FOR SOME 57 (1993). See generally *id.* at 39-97.

17. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984).

indeterminate, incoherent, contradictory, excessively abstract and subject to reification, excessively individualistic, dependent upon an unmakeable public/private distinction, and generally manipulated to serve the privileged classes.¹⁸

What makes Professor Schauer's argument provocative is that it does not depend upon any of those much-debated claims. Rather, he puts forward what I will call the Market Capture Thesis. The thesis combines three assumptions:

- (1) The market is controlled by conservative sources.
- (2) The free speech principle is a laissez-faire principle.
- (3) The free speech principle is harmful to the left.

The Market Capture Thesis should be contrasted with the Conservative Interpreters Thesis, namely that conservative justices convert a relatively indeterminate principle like free speech into a principle of protection for the privileged. By contrast, the Market Capture Thesis regards the free speech principle as more determinate. According to the postulates of the thesis, the free speech principle is correctly interpreted in ways that are damaging to the left.

In responding to the Market Capture Thesis, I shall make three arguments.

(1) The assumption that the market is controlled by conservative forces deserves a qualified defense. It is not obviously correct, however, and there are two types of objections. First, there is the establishment or journalistic objection. Such an objection would state, for example, that the press is an appropriate counterforce to establishment politics, and that it is the foremost

18. See, e.g., Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Horwitz, *supra* note 15; Duncan Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981) [hereinafter Kennedy, *Critical Labor Law Theory*]; Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 351-62 (1979); Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 468-82 (1981); Frances Olsen, *Statutory Rape, A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 401 (1984); Tushnet, *supra* note 17.

The arguments of the critical theorists have triggered critical reactions from liberals, leftists, feminists, and critical race theorists, among others (not that these categories are all mutually exclusive). For a sampling of the diverse responses, see Kimberlee W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 441 (1987); Richard Delgado, *Critical Legal Studies and the Realities of Race*, 23 HARV. C.R.-C.L. L. REV. 407 (1988); Sheri L. Johnson, *Confessions, Criminals and Community*, 26 HARV. C.R.-C.L. L. REV. 327 (1991); Michael J. Perry, *Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405 (1984); Judith Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9 (1989); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Ed Sparger, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 514 (1984); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-05 (1987) [hereinafter Williams, *Alchemical Notes*]; Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987) [hereinafter Williams, *Taking Rights Aggressively*].

representative of the checking value in American politics.¹⁹ Sometimes, on that characterization, the mass media support conservatives; sometimes the mass media oppose them. By its characterization, therefore, the contention that the mass media favor the powerful or the conservatives is distorted.

The second type of objection is right-wing in character. It suggests that the Market Capture Thesis does not take adequate account of the "liberal press." This argument postulates that the press is controlled by liberals and that the First Amendment allows the liberal press to be biased. According to this objection, the Market Capture Thesis is dead wrong.

There is some truth to both the establishment and right-wing characterizations of the press. Nonetheless, this branch of the Market Capture Thesis deserves a qualified defense. Crucial structural features incline the press to tilt against the left. In exploring those features, I will support the position that a market unregulated by the government will be a market dominated by powerful social and economic forces, forces that are hostile to the left.

(2) Although the assumption that the market is controlled by conservative forces deserves a qualified defense, the assumption that the free speech principle is harmful to the left deserves to be repudiated even if it is interpreted as a laissez-faire principle. The thesis does not take sufficient account of the multiplicity of power relations both in and out of the mass media. Moreover, the thesis is too blasé about the kinds of interventions one might expect from government. If conservative forces can control the market, conservative forces can control the government and repress dissident movements.

(3) The assumption that the free speech principle is laissez-faire deserves to be contested. Other interpretations of the free speech principle countenance a more active state, but a state nonetheless limited in its authority to squelch the less powerful. In other words, the free speech principle²⁰ is susceptible to interpretations more sympathetic to the concerns of the less powerful.

Before addressing these three arguments, I need to begin with a point about political definition and perspective. I propose to discuss the Market Capture Thesis primarily from the perspective of the left²¹ as opposed to a liberal

19. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

20. Although I will refer to the "free speech principle" throughout, the monistic connotation of the phrase is quite misleading. It detracts from the complexity of free speech as a practice and from the extent to which free speech refers to a multiplicity of sometimes conflicting values. See generally STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5-6, 104-05 (1990) [hereinafter SHIFFRIN, *ROMANCE*]; Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983). Professor Schauer has long understood this. See generally Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). His usage of the free speech principle is based on an understanding of what the public understands about the idea of free speech. I do not find his argument persuasive. See *infra* note 166. For criticism of Professor Schauer's essay on this score and other aspects, see Steven D. Smith, *The Politics of Free Speech: A Comment on Schauer*, 64 U. COLO. L. REV. 959 (1993); Steven L. Winter, *Fast Food and False Friends in the Shopping Mall of Ideas*, 64 U. COLO. L. REV. 965 (1993).

21. I do not really believe that the left is united, and I will indicate some important areas where the left is divided. The same comment applies to liberals.

perspective (though these perspectives frequently overlap). In order to avoid confusion, my own terms might be made clearer by comparison and contrast with those of Professor Schauer.

Professor Schauer refers to liberals in a general way, specifying the array of people who actively supported Michael Dukakis and Bill Clinton, in contrast to those who actively supported Ronald Reagan and George Bush.²² Surely, however, Professor Schauer would agree that many of the active supporters of Clinton and Dukakis were not liberals (consider Southern conservatives) or were not necessarily liberals (consider the Wall Street bankers). In addition, downtown real estate developers whose interests in some ways coincide with those of liberals need not themselves be liberals—they may, for example, oppose defense spending to make room for projects that many believe will assist the disadvantaged. Given that the business interests which supported Clinton or Dukakis do not parade under the title of the conventional liberal, I take it that Schauer has in mind a picture of the liberal activist.

As to the content of what liberals believe, Professor Schauer states that they are concerned with the less powerful and with equalization of opportunity.²³ I do not quarrel with the view that liberals are concerned with the less powerful and with equalization of opportunity (though the latter in particular is often emphasized by conservatives, as well). Schauer suggests that these are among the concerns of contemporary liberalism, and for my purposes, that is acceptable except in one respect. What seems to be missing from Schauer's perspective on liberalism is a recognition that many liberals value freedom of speech as an end in itself or as flowing from notions of dignity or respect, not merely as a means to helping the less powerful. If these liberals were convinced that the free speech principle helped the powerful, they would regret it, but that demonstration would prompt them to press harder for change in the distribution of wealth in society. They would not be prompted to reevaluate the free speech principle because their support for that principle is primarily based on non-consequentialist reasoning.²⁴

To be sure, many liberals are more enthusiastic about consequentialist arguments,²⁵ but the sting of the Market Capture Thesis seems to attach most strongly to those on the left whose embrace of the free speech principle is

22. Schauer, *supra* note 7, at 942 n.37.

23. *Id.* at 951.

24. The most comprehensive, and to my mind the most interesting, discussion of the free speech principle from this perspective comes from someone who is a liberal in distinctive respects and a radical in others. See C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989) (embracing a free speech liberty principle for primarily non-consequentialist reasons, but arguing that the liberty principle does not extend to business corporations or media corporations, although he would give substantial protection to the latter). Other prominent work in this vein includes BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986).

25. See, e.g., ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969); JOHN S. MILL, *ON LIBERTY* (David Spitz ed. 1975); RICHARD RORTY, *CONSEQUENCES OF PRAGMATISM* (1982); RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* (1989).

more likely to be consciously strategic than the typical liberal,²⁶ and whose political identity is even more closely tied to the concerns of the downtrodden than is the case with liberals.

I am unsure from Professor Schauer's article, however, whether he means to exclude those supporters of Clinton and Dukakis who did not think of themselves as liberals, but who thought of themselves as progressives, radicals, or just members of the left. At one point in his article, he refers to radicals as "the term of choice for everyone who vigorously disagrees with you."²⁷ Nonetheless, progressives, radicals, or members of the left meet Schauer's working understanding of liberals, that is, they favor economic intervention, but also favor the free speech principle. Those radicals who do not favor the free speech principle would clearly be excluded from Schauer's analysis and are not necessary to mine.

In any event, whether or not I am right about Schauer's meaning, I shall refer to the left (including progressives and radicals)²⁸ in my comments and will include those who identify with the left (assuming they support the free speech principle),²⁹ whether or not they made the strategic choice to support Clinton, Dukakis, or both.

I. THE DISTORTED MARKETPLACE

Journalists routinely applaud the media as a powerful check on abusive government or as a neutral reporter of all the news, or both. By contrast, conservative politicians and writers have complained for more than twenty years about the "liberal" media.³⁰ If either the journalists or the conservatives are right, the Market Capture Thesis is wrong. The thesis assumes that the mass media serve the interests of conservatives.

The mass media are a complicated phenomena, and I propose to reflect on their complexity in ways that show that the media might help conservatives in some circumstances and help liberals in others. In any case, the structure of the institutional press assures that the intellectual marketplace is skewed in many ways that marginalize persons on the left—particularly radicals—or their concerns.³¹ Although I will use the term "discriminates," I do not refer to a conscious act in most circumstances, but to the operational impact of the

26. Of course, many on the left have deep attachments to the free speech principle, *see* BAKER, *supra* note 24, and many liberals have not supported the free speech principle in times when it counted. *See infra* note 149.

27. Schauer, *supra* note 7, at 942 n.37.

28. Left-liberals will fit in my analysis much of the time as well.

29. It makes no difference for this analysis whether the free speech principle is embodied in the Constitution.

30. The conservative campaign began with the public complaints of Vice President Spiro T. Agnew in 1969. MARTIN A. LEE & NORMAN SOLOMON, UNRELIABLE SOURCES: A GUIDE TO DETECTING BIAS IN NEWS MEDIA 142 (1990). For one of the more recent rounds of conservative criticism, *see* Symposium, *The Decline of American Journalism*, NAT'L REV., June 21, 1993, at 25. Much conservative commentary builds on the material presented in ROBERT LICHTER ET AL., *THE MEDIA ELITE* (1986).

31. Given our assumption that left-liberals and progressives are committed to the free speech principle, the bias against radicals would trouble not only radicals, but also left-liberals and progressives.

media's functioning. I do not suppose that the mass media "discriminate" only against the left. In my view, a strong case can be made for the view that the media discriminate, for example, against the Christian right.³² Moreover, parts of my discussion will point to factors that help to explain discrimination against some segments of the right, but that is not my focus.

The discrimination I have in mind does not involve a conspiracy. If there were a conspiracy, one might imagine an easy fix. But the causes are deeper; they frequently involve the structure of the media. In exploring these causes, it will be helpful first to emphasize entertainment programming and media structure; second, domestic affairs reporting; third, foreign policy reporting and the objectivity ethic; and fourth, depictions of corporations, whether in entertainment or public policy formats.

A. Entertainment Programming and Media Structure

Perhaps the most important feature of the mass media is their support by advertisers. Commercial broadcasters, for example, receive virtually all of their revenue from advertisers. Newspapers receive the vast majority of their revenue from advertisers.³³

The negative impact (from a leftist perspective) of this advertiser dependence is perhaps most severe in the broadcast media. The commercial character of the broadcast media exposes millions of citizens to a daily torrent of commercial messages. These messages encourage the view that self-fulfillment and happiness come not from our interaction with others, but through our relationship with goods. They collectively encourage a hedonistic, selfish, and materialistic culture. As the United Nations Educational, Scientific, and Cultural Organization's ("UNESCO") International Commission for the Study of Communication Problems has stated, advertising "tends to promote attitudes and life-styles which extol acquisition and consumption at the expense of other values."³⁴ Moreover, such commercial messages tend to promote a political atmosphere which exalts the ability of the state "to maintain a high standard of living for most individuals and to shore up the expectations of the less well off for the future."³⁵

32. Not entirely separate from the perception of the Christian right as "Other," or a fringe group, the media tend to be somewhat more favorable to pro-choice groups than to pro-life groups and usually exhibits little patience with negative stereotyping of gays. See Howard Kurtz, *Beyond the Fringe, a New Skittishness*, WASH. POST, May 17-23, 1993, at 25 (national weekly edition).

33. See John Morton, *The Business of Journalism: Value of Newspapers Will Fall in War*, WASH. JOURNALISM REV., Mar. 1991, at 56 ("Advertising typically accounts for 80 percent of revenue and all of the profit at most newspapers; these days, circulation revenue does not even cover the cost of the paper a daily is printed on.").

34. INT'L COMM'N FOR THE STUDY OF COMMUNICATION PROBLEMS, *MANY VOICES, ONE WORLD* 110 (1980).

35. JEFFREY B. ABRAMSON ET AL., *THE ELECTRONIC COMMONWEALTH* 288 (1988). As is true with many of the points I make, I do not suppose that the particular problem identified (here, the emphasis on a materialistic culture) is of concern to all people on the left or *only* to people on the left, but I do think that most people on the left share this concern. Democratic participation, for example, is ordinarily prized by the left as more important than a relationship with a Mazda. Granted, some people on the right

Mass media advertising also promotes a sexist culture. The appeal of many commercials is explicitly sexual, and women are depicted as sex objects and subordinate creatures.³⁶ As the chief creative officer of a major advertising agency put it, "The old saying 'sex sells,' still prevails[.] . . . But it has to be done with taste."³⁷ In other words, treating women as sex objects is considered an appropriate way to sell products,³⁸ but excessive nudity or violence may be offensive. The problem, of course, is *not* any puritanical judgment that sex is dirty, or even the antiegalitarian assumption that sex best flourishes in circumstances where women are subordinate—though that assumption eroticizes injustice.³⁹ The problem is that an enormous number of televised depictions of women focus on women's sexual characteristics. Television then encourages men to see women, and women to see themselves, as sexual creatures, to the exclusion of other characteristics.⁴⁰ As Ronald Collins puts it, "When a single voice badgers or degrades women in the workplace because of their gender, we call it sexual harassment. When that voice is amplified for millions of people by millions of dollars, we call it advertising."⁴¹

These are not the only distortive effects of advertiser power in the mass media. Although some advertisers thrive on fearful messages,⁴² most take advantage of upbeat themes and jingles.⁴³ The overall theme is that all is

might also be bothered by the phenomena I describe. Those on the right might be less likely, however, to see the causes of the instant phenomenon as being rooted in the profit orientation of the media.

36. See generally E. GOFFMAN, *GENDER ADVERTISEMENTS* (1979). This problem is not confined to advertising. See Becker, *Politics*, *supra* note 12, at 486-90.

37. Joanne Lipman, *Sexy or Sexist? Recent Ads Spark Debate*, WALL ST. J., Sept. 30, 1991, at B1 (quoting Ron Anderson of the Bozell advertising agency).

38. Thus, one junior advertising executive states, "You've always got to be conscious of who your customer is. It may offend some groups—but they aren't your customers." *Id.*

39. See generally CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987).

40. SUT JHALLY, *THE CODES OF ADVERTISING* 138-39 (1987).

41. Ronald K.L. Collins, *Bikini Team: Sexism for the Many*, L.A. TIMES, Nov. 20, 1991, at B7. For the suggestion that some advertisers are in the process of changing their ways, see Joanne Lipman, *Farewell, at Last to Bimbo Campaigns?*, WALL ST. J., Jan. 31, 1992, at B5. Problems with how women are treated in the mass media, of course, are not confined to advertising. See generally Jane D. Brown et al., *Mass Media, Sex and Sexuality*, 4 ADOLESCENT MED. 511 (1993); Nancy Signorielli, *Sex Roles and Stereotyping on Television*, 4 ADOLESCENT MED. 551 (1993).

The role the media play in influencing perceptions of people of color, particularly given the differences between their treatment (or lack of treatment) of various groups, is too complicated to pursue in this Article. For a valuable study of the ways in which local news contributes to modern racism regarding African Americans, see Robert M. Entman, *Blacks in the News: Television, Modern Racism and Cultural Change*, 69 JOURNALISM Q. 341 (1992). For insights regarding programming, see SUT JHALLY, *ENLIGHTENED RACISM: THE COSBY SHOW, AUDIENCES AND THE MYTH OF THE AMERICAN DREAM* (1992).

42. Some life insurance company commercials fit this description. More typically, even though commercials for the most part depict the world in rosy terms, the viewer is often made to feel anxious in that her life does not match up to the nostalgic characterizations of life in the commercial. Of course, the message is that possession of the advertised product will relieve the anxiety.

43. WILLIAM LEISS ET AL., *SOCIAL COMMUNICATION IN ADVERTISING* 69 (2d ed. 1990).

[A]dvertisements . . . link[] new goods and styles with traditional images of well-being: the slower pace, quiet and serenity, open space, and closeness to natures of rural life; happiness of loved ones in a close family setting that includes multiple generations; the attainment of goals set in accordance with personal, rather than institutional, demands; the concern for quality

right with the world—so long as you have the advertiser's product. Unfortunately, that theme is a major source of destructive anxiety and frustration. As Collins and Jacobson write: "Our system of advertising purposefully promotes envy, creates anxiety, and fosters insecurity. The tragic end-product of this is kids killing kids in Baltimore and elsewhere in order to walk in their playmates' \$100 name-brand sneakers."⁴⁴

The importance of advertiser power carries far beyond the content and emotional impact of the advertisements.⁴⁵ For the most part, advertisers insist that their product messages be placed in programs that create a sunny consumer atmosphere.⁴⁶ Advertisers discourage messages that might be disturbing to a mainstream audience.⁴⁷ Of course, mass audiences do not

and good taste in judging fine foods, wine and clothing.

An advertisement's composition often connects background imagery with products having not the slightest intrinsic relation to it—the automobile or cigarette package displayed against a stunning picture of unspoiled wilderness, the liquor bottle set in a farmhouse room full of hand-crafted furniture—in a straightforward attempt to effect a transfer of the positive feelings evoked by the imagery to the product.

Id.

44. Ronald K.L. Collins & Michael F. Jacobson, *Commercialism Versus Culture*, CHRISTIAN SCIENCE MONITOR, Sept. 19, 1990, at 19. On the negative effects of advertising, see generally Ronald K.L. Collins & David M. Skover, *Commerce & Communication*, 71 TEX. L. REV. 697 (1993). For "Responses," see Leo Bogart, *Freedom to Know or Freedom to Say?*, 71 TEX. L. REV. 815 (1993); Sut Jhally, *Commercial Culture, Collective Values, and the Future*, 71 TEX. L. REV. 805 (1993); Alex Kozinski & Stuart Banner, *The Anti-History and Pre-History of Commercial Speech*, 71 TEX. L. REV. 747 (1993); and Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993).

45. For a discussion of the impact of advertisers on the non-advertising content of the mass media in both the entertainment and public affairs contexts, see generally RONALD K.L. COLLINS, *DICTATING CONTENT: HOW ADVERTISING PRESSURE CAN CORRUPT A FREE PRESS* (1992); and C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097 (1992). See also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 62-66 (1993).

46. See MARK C. MILLER, *BOXED IN: THE CULTURE OF TV* 13 (1988):

In 1959, for example, one adman wrote a letter to Elmer Rice, explaining why the agency would not support a series based on the playwright's early realist drama *Street Scene*:

We know of no advertiser or advertising agency of any importance in this country who would knowingly allow the products which he is trying to advertise to the public to become associated with the squalor . . . and general 'down' character . . . of *Street Scene*. . . . On the contrary, it is the general policy of advertisers to glamorize their products, the people who buy them, and the whole American social and economic scene.

Id. (emphasis added).

Advertisers generally are provided suitable surroundings for their products:

[W]ith few exceptions, prime time gives us people preoccupied with personal ambition. . . . If not surrounded by middle-class arrays of consumer goods, they themselves are glamorous incarnations of desire. The happiness they long for is private, not public; they make few demands on society as a whole, and even when troubled they seem content with the existing institutional order. . . . The sumptuous and brightly lit settings of most series amount to advertisements for a consumption-centered version of the good life, and this doesn't even take into consideration the incessant commercials, which convey the idea that human aspiration for liberty, pleasure, accomplishment, and status can be fulfilled in the realm of consumption. The relentless background hum of prime time is this packaged good life.

TODD GITLIN, *INSIDE PRIME TIME* 268-69 (1983).

47. For example, when *thirtysomething* aired an episode focusing on a one-night-stand between two gay characters, ABC lost \$1,000,000 in advertising. When the two characters reappeared on the show in the course of the depiction of a New Year's Eve party they attended, they briefly discussed their one-night-stand and gave each other a midnight kiss on the cheek. For this episode, ABC lost \$500,000. Steve Weinstein, *When Gay Means Loss of Revenue*, L.A. TIMES, Dec. 22, 1990, at F1, F5. Because of

thrive on disturbing messages, but there is reason to believe that advertisers are more squeamish than mass audiences simply because they do not want their products to be associated with controversial programs.⁴⁸ For example, abortion is a subject that entertainment television will rarely consider. As the *New York Times* put it:

The subject of abortion makes networks and advertisers so uneasy that on the rare occasion it has been mentioned on a show, characters twist themselves into elocutionary contortions rather than actually say the word. Even the razor-tongued Murphy Brown did not use the word during an episode about whether to continue her pregnancy.⁴⁹

In explaining a decision by Home Box Office ("HBO") to carry a documentary about abortion, Bridget Potter, HBO's senior vice president for original programming, stated: "We're not any braver than the networks. It's just that our economic basis is different."⁵⁰ Or as the *New York Times* puts it, "HBO, a viewer subscription service does not have to assuage sponsors."⁵¹

In lieu of controversial programs, advertisers often insist on "action"—fast moving programming that keeps people glued to a screen without encouraging thought.

In pursuit of higher ratings that bring higher earnings, TV programmers have honed mesmerizing techniques—described by one critic as "constant violence, gratuitous sex, and deliberate manipulation of split-second change of images and sounds to make an emotional and sensory impact that leaves no time for reflection." More than ever, what's on the screen is in constant motion, with a style of eventfulness and a lack of substance—designed to minimize the risk that viewers will think long enough to tune out.⁵²

Violent programming is particularly noteworthy. As Sonia Shah observes:

Every day, all across the land, behind tightly locked doors, millions of Americans are watching other Americans stalking, harassing, raping, and

their concerns about the possibility of advertiser withdrawals, "producers frequently discuss the plots of their shows with a network before filming begins." Kevin Goldman, *NBC to Hold Show's Producers Liable for Advertiser Response to Gay Plot*, WALL ST. J., Sept. 30, 1991, at B3. Jeff Sagansky, president of CBS Entertainment, maintains, as an industry publication put it, that advertisers are "increasingly reluctant to back hard-hitting shows because special interest groups are more active in threatening boycotts." Bill Kirtz, *Top Execs Take Hard Look at TV's Future*, BROADCASTING, Feb. 15, 1993, at 12. [Source not in yet—needs cite-checking.]

48. Controversial themes can be explored on network television, but they must be dealt with in a balanced way so that segments of the mass audience will not be offended. The line between balance and blandness is often thin. For treatment of the ways in which special interest groups pressure the networks to keep controversy off the air or to minimize its offensive aspects, and the ways in which the networks seek to handle the pressure, see generally KATHRYN C. MONTGOMERY, *TARGET: PRIME TIME* (1989).

49. Jan Hoffman, *TV Shouts 'Baby' (and Barely Whispers 'Abortion')*, N.Y. TIMES, May 31, 1992, at H1, H27. For a discussion of the uproar surrounding the treatment of the abortion issue in two episodes of the *Maude* show, see MONTGOMERY, *supra* note 48, at 27-50.

50. Hoffman, *supra* note 49, at H27.

51. *Id.*

52. LEE & SOLOMON, *supra* note 30, at 3. As in the sitcom, the problem pursued in the action program is ordinarily solved by the end of the show. On television, therefore, problems can ordinarily be resolved within the program hour or by a race to the local store to buy a product. It is a shame that political candidates can do no more than promise the instant solutions that television encourages Americans to expect.

killing each other on TV. With growing alienation and creeping paranoia, we are engrossed with over fifteen acts of violence, including at least two murders, every evening.^{53]}

It has not made us more violent, necessarily. But it scares us. It makes us more likely to buy locks, watchdogs, and guns for protection; think that nuclear or biological annihilation will occur within our lifetimes; want more money spent on crime, drug abuse, and national defense; and most ominously, consent to our own and others' repression in the name of security.⁵⁴

Television programmers have been only too willing to accommodate the advertisers' needs in order to hold the audience. As Ben H. Bagdikian states, "The basic strategy in designing programs on commercial television and cable is not primarily what is perceived as the highest needs and wants of the audience, but what is perceived as the most likely to attract advertising."⁵⁵ Thus, television programming in general promotes an "all is right with the world"⁵⁶ atmosphere or, alternatively, exposes viewers to a frightening (yet titillating) world where violence is omnipresent, ironically, while desensitizing viewers to the effects of violence.

Television programming is also undemocratic in the sense that substantial portions of the public are excluded from programmers' conceptions of the target audience.⁵⁷ Advertisers and, therefore, television programmers want consumers, not just viewers. Accordingly, children (who have little money) and the aged (whose buying habits are thought to be fixed) are excluded from the target audiences of most television programming.⁵⁸ NBC, for example,

53. It is too early to tell what impact the current network agreement to give warnings about the violence in particular shows will have.

54. Sonia Shah, *The Index: TV Violence and Paranoia*, 1 *MEDIACULTURE REV.*, Feb. 1992, at 7-8. Beyond the fear, there is strong evidence that televised depictions of violence cause increased violence. See generally George Comstock & Victor C. Strasburger, *Media Violence: Q & A*, 4 *ADOLESCENT MED.* 495 (1993).

55. BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* 8 (3d ed. 1990); see also LEISS ET AL., *supra* note 43, at 186:

[Networks] just want the audience to watch so that their time can be sold to advertisers. Networks have no economic need for good quality programming that challenges and excites the audience. Simple attention-getting, as opposed to communicating interesting and thought-provoking material, is enough. The components of a set network formula are occasionally adjusted for particular programs, making commercial television a form of 'recombinant culture' in which the same elements—sex, adventure, violence—are constantly rejuggled . . .

Id. (citing GITLIN, *supra* note 46).

56. JOHN KEANE, *THE MEDIA AND DEMOCRACY* 67 (1991) ("The culture industry mass produces mass deception, by encouraging individuals to identify with the media in order to escape from everyday drudgery. . . . Everybody is amused into oblivion."); see also GITLIN, *supra* note 46, at 92. To some extent, however, the cheery face of American television is unconnected to advertiser dependence (although noncommercial television would not likely support programming that was frequently interrupted with sweeping vistas and soaring music). Few American viewers would want to see a steady diet of programming "downers." Nonetheless, it is possible that the happy atmosphere of American television has encouraged a pervasive demand for cheer. Consider the forced public displays of cheerful camaraderie on your local newscast wherever it may be.

57. See KEANE, *supra* note 56, at 77-78; Baker, *supra* note 45, at 2164-67. By looking to ratings as a basis for continuing programming, television executives do not take into account the intensity of viewers' preferences. *Id.* at 79.

58. See EDWARD L. PALMER, *TELEVISION AND AMERICA'S CHILDREN* 21-25 (1988) (discussing why advertiser-supported television fails children).

has canceled a number of shows not because of poor ratings, but because of poor demographics. From the advertiser's perspective, the wrong people were watching these shows. As one television critic explained, "[W]hat NBC was doing was what almost all the networks are doing these days—basically telling viewers over 50 years old to get lost. In fact, for advertisers, you're kind of suspect once you hit 35 or 40."⁵⁹

This phenomenon is not confined to television. As Bagdikian reports:

Otis Chandler, head of the Times Mirror Empire, owner of the *Los Angeles Times* and the fourth-largest newspaper chain said, "The target class of the *Times* is . . . in the middle class and the upper class. . . . We are not trying to get mass circulation, but quality circulation." On another occasion, he said, "We arbitrarily cut back some of our low-income circulation. . . . The economics of American newspaper publishing is based on an advertising base, not a circulation base."⁶⁰

Columbia sociologist Herbert Gans observes that the problem is not confined to broadcasting and newspapers: "[M]any magazines have tried to reduce their total circulation, hoping to discourage less affluent readers whom neither advertisers nor journalists want."⁶¹ When *Ms.* magazine decided to drop advertising, its editors spoke of a new freedom in editorial policy, including the freedom "to appeal to all readers, including elderly women, who are normally shunned by most advertisers."⁶²

B. Domestic Affairs Reporting

Although the national news media aim at a target audience that is similar to the audience sought in network entertainment programming, their reporting to some extent offers a corrective to the misleading picture of the world presented in entertainment television. Nonetheless, the presentations of the national news media are bounded in ways that serve to exclude radical questions and critique.⁶³ Radicals question the structure of American society. They ask "why wealth and power are so unevenly distributed in America, and between the developed and developing nations; why corporations have so much power, and citizens so little; why unemployment, inflation, and poverty remain; and why women and racial minorities continue to occupy inferior positions."⁶⁴

59. Rick Du Brow, *NBC Faces a Prime-Time Identity Crisis*, L.A. TIMES, Mar. 14, 1992, at F1; see also LEISS, *supra* note 43, at 113 (discussing the preference for reliable consumers over elderly, low income, and rural consumers); MONTGOMERY, *supra* note 48, at 107 (noting the cancellation of high-rated shows with "rural skews"); Bill Carter, *Fall Network Schedules Offer Plenty of Choices (At Least for the Young)*, N.Y. TIMES, May 27, 1992, at C15.

60. BAGDIKIAN, *supra* note 55, at 116.

61. HERBERT J. GANS, *DECIDING WHAT'S NEWS: A STUDY OF CBS EVENING NEWS, NBC NIGHTLY NEWS, NEWSWEEK AND TIME* 216 (1980).

62. Deirdre Carmody, *Ms. Magazine Prepares for a Life Without Ads*, N.Y. TIMES, Mar. 5, 1990, at D9.

63. At the local broadcast level, cheery talk and the need for a happy story, mixed in with the weather and sports, do not leave much time for serious stories of any kind, let alone the entertaining of radical questions and critique.

64. GANS, *supra* note 61, at 277.

But, most Americans rely upon the broadcasting medium for analysis of public affairs, and the technology and political economy of the broadcasting medium disadvantages radicals.⁶⁵ Structural questions such as those raised by radicals cannot be explored thoughtfully through pictorial means. The process by which corporations achieve and maintain power, for example, is not easily captured on camera for the nightly news.

Of course, "talking heads" can raise such questions, but network broadcasters believe that dramatic visual footage is more likely to attract audiences than that which is likely to emerge from a talking head.⁶⁶ Given this state of affairs, radical issues will inevitably be marginal or absent in network news programs.⁶⁷

But the problem ranges well beyond the technology or the attitudes broadcasters bring to the technology. Consider, first, the coverage of election campaigns, whether in the broadcast or print media. From the outset, some radicals would find election coverage inflated. From their perspective, the media wrongly assume that the outcome of particular elections is very important rather than a choice between tweedledum and tweedledee.⁶⁸ Those radical candidates who do participate in elections receive conspicuous inattention from the media.

The exclusion of any significant attention to radical candidates or the issues raised by those candidates is related to another standard criticism of the media. The media focus on the question of who will win the "horse race" at the expense of the issues.⁶⁹ The media typically treat the audience as a group

65. Some forecasters predict the demise of this influence by pointing to diverse methods of gaining information through new technologies. I may be wrong, but I agree with those who think that such forecasters overstate their case. See ABRAMSON ET AL., *supra* note 35, at 108, 262-63, 294. For discussion of the decline, see BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS 8-9, 153-54, 196-201 (1992).

66. See PHYLLIS KANISS, MAKING LOCAL NEWS 6 (1991) ("[T]he importance placed on video leads local broadcast journalists to give short shrift to many important but picture-less policy issues . . ."); see also MARK HERTSGAARD, ON BENDED KNEE: THE PRESS AND THE REAGAN PRESIDENCY 37, 52-53 (1988); HOWARD KURTZ, MEDIA CIRCUS: THE TROUBLE WITH AMERICA'S NEWSPAPERS 38 (1993). On the interaction between the visual medium, the desire to entertain, and the decline of political discourse, see Ronald K.L. Collins & David M. Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990). See also SUNSTEIN, *supra* note 45, at 59-60.

67. For a discussion of why radicals so infrequently appear on network news or public broadcasting, see *infra* notes 104-18 and accompanying text.

68. A co-chair of the Socialist Party-U.S.A. has argued that the struggle for socialism is not about which party controls Washington, but rather about economic power. David McReynolds, *Socialism Yes*, PROGRESSIVE, Apr. 1993, at 24, 26.

69. See ROBERT M. ENTMAN, DEMOCRACY WITHOUT CITIZENS: MEDIA AND THE DECAY OF AMERICAN POLITICS 21 (1989) ("[S]cholars find that coverage of presidential campaigns generally emphasizes the horse race (who's gaining, who's fading, and why) much more than the policy issues or records of the candidates."); see also JEFFREY C. GOLDFARB, THE CYNICAL SOCIETY: THE CULTURE OF POLITICS AND THE POLITICS OF CULTURE IN AMERICAN SOCIETY 5-6 (1991); SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION 127-29 (1987); SUNSTEIN, *supra* note 45, at 60-61; Henry R. Brady & Richard Johnston, *What's the Primary Message: Horse Race or Issue Journalism?*, in MEDIA AND MOMENTUM: THE NEW HAMPSHIRE PRIMARY AND NOMINATION POLITICS 127-86 (Gary R. Orren & Nelson W. Polsby eds. 1987) [hereinafter MEDIA AND MOMENTUM]; Emmet H. Buell, Jr., "Locals" and "Cosmopolitans": National, Regional, and State Newspaper Coverage of the New Hampshire Primary, in MEDIA AND MOMENTUM, *supra*, at 60-103; John Tierney, *Campaign Journal: It's Journalists Reneging on Election Promises*, N.Y. TIMES, Jan. 31, 1992, at A12.

of prognosticators rather than as a group of citizens preparing to vote. Reporters tend not only to disregard the issues raised by minor party candidates (of whatever political persuasion, unless they are billionaires with a chance in the horse race), but also to downplay the issues raised by the candidates of the major parties.⁷⁰ Although the press will usually explain that the audience is not "interested," there may be another factor.

Reporters are a cynical group. They tend to write about the horse race at the expense of the issues because they—*like many of the candidates*—perceive the programs and issue statements to be nothing more than a part of the horse race. If the candidates do not take issues seriously, and if political reporters continually mingle with the politicians and their "savvy" handlers, a tendency to look at how issues "sell" in various locales tends to trump serious consideration of the issues on their merits (of course, there is a "Which came first, the chicken or the egg?" problem here). Perhaps more important, handicapping the horse race is easier and less time-consuming than any attempt to master the issues would be. Indeed, it would be impossible for a reporter or a few reporters to master any but a fraction of the issues that might face important politicians and their staffs.

Thus, the primary sources of election news are those that are easy to acquire—public speeches and debates by the candidates and interviews with sources in the opposing camps, typically about their strategy. We hear all about the horse race, who is winning so far, where, why, and speculation about whether the race could change, and how. We often hear or read snippets of what the candidate said in a public speech or an "intimate" private interview. Yet the most revealing part of the horse race is the part that the media rarely cover, and their coverage is of substantial concern to radicals. We do not hear what the candidate said in the balance of a campaign day—in between the speeches and after the speeches are over. In the balance of the day, the candidate asked representatives of political action committees and special interests for money.⁷¹ What happened in those conversations? What was promised? What did the candidate say about the issues there? Is there any difference between the candidate's public pronouncements and his or her statements to contributors?

Presumably, the money trail should be of interest even to the cynical. Moreover, in many races it is relatively easy to gain access to databases that track contributions made to candidates.⁷² It is, nonetheless, difficult for

70. Coverage of the 1992 presidential election may have presented more information about the issues than many prior elections, but coverage of most state and congressional elections still followed the horse race pattern. Even in the 1992 presidential election, a six-week study of the period immediately following the Republican National Convention found that only 17% of the three major networks' election stories focused on policy issues: "Several important topics such as education, crime, the military budget, racism, and the banking crisis were not the subject of any campaign reports during the six weeks studied." Jim Naureckas, *Unfair to Bush? Unfair to Clinton? Campaign Coverage Was Unfair to Voters*, 5 EXTRA!, Dec. 1992, at 5, 6.

71. See generally THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986) (citing examples of candidates and their political action committee and special interest contributors).

72. ABRAMSON ET AL., *supra* note 35, at 98.

reporters to get information about what contributors and candidates said in private conversations. Although campaign disclosure laws often make it possible to draw distinctions between candidates by their financial supporters, the filing dates are sometimes too late to permit meaningful reporting during the election. It is too time-consuming and too expensive for reporters to follow the money trail of some of the most important contributors. By contrast, it is convenient and easy to write the daily story or broadcast the nightly sound bite while following the candidate from place to place. Thus, the nightly sound bite becomes the daily fare and the investigative story is a comparatively rare phenomenon.⁷³

The manner in which reporters cover elections is typical of their overall patterns of public affairs coverage. Reporters do not have the time, the resources, or, in many cases, the training to conduct primary investigations.⁷⁴ To report on what sources in power say appears to "mirror" reality in a way that is least likely to offend the mass audience. The reliance on convenient, inexpensive, but powerful sources, therefore, dominates the national news generally, not just in election seasons.⁷⁵ The White House, the administrative agencies, and sources in the Congress are major suppliers of "product" for the news industry. The role of the press in dealing with this product is at once active and surprisingly passive. It is active in the sense that the press decides what to report and what not to report, and that exercise of discretion is notoriously influential. Despite its frequent characterization as the fourth estate, however, the press, save for the editorial pages, does not ordinarily speak with an independent voice.⁷⁶ As Sam Donaldson puts it, "As a rule, we are, if not handmaidens of the establishment, at least bloodbrothers to the establishment. . . [.] We end up the day usually having some version of what the White House has suggested as a story."⁷⁷ Or as Lyn Nofziger observed:

[T]here existed "kind of a mutual back-scratching" arrangement between television and the Reagan communications apparatus: "It's an unsaid thing.

73. As Walter Karp has stated, "It is investigative journalism that wins the professional honors, that makes what little history the press ever makes, and that provides the misleading exception that proves the rule: the American press, unbidden by powerful sources, seldom investigates anything." LEE & SOLOMON, *supra* note 30, at 18 (quoting Walter Karp).

74. JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 315 (1992).

75. Watergate is the exception that proves the rule. It was a story pursued at great expense and at great risk by one newspaper. Watergate reporting is to press practice as *L.A. Law* is to legal practice. As Gans observes:

The investigative reporting required for an exposé is expensive and not always productive, for reporters must usually be assigned to the story for weeks, if not months, thus making them unavailable for other stories; and sometimes, months of investigation may not produce a suitable story. As a result, most news media resort to investigative reporting only when they cannot obtain access any other way or, equally often, when they need a circulation or rating booster.

GANS, *supra* note 61, at 118-19.

76. "[T]elevision news, and American news in general, reflects and sustains the 'official' view. Journalists rely heavily on officials and on routine channels of information—the press conference, the informal briefing, and the handout . . ." IYENGAR & KINDER, *supra* note 69, at 132. One study found that 78% of the sources for domestic and foreign stories in the *New York Times* and the *Washington Post* were public officials. LEON V. SIGAL, *REPORTERS AND OFFICIALS: THE ORGANIZATION AND POLITICS OF NEWSMAKING* 124 tbl. 6-5 (1973).

77. LEE & SOLOMON, *supra* note 30, at 17 (quoting Sam Donaldson).

You need each other. Television needs Deaver to make sure they get something out of the White House today. Deaver needs television to make sure the President is presented in a good light."⁷⁸

Indeed, the power of White House story selection was perfected during the Reagan presidency. The White House understood that network news stories are frequently triggered by reports in that day's *New York Times* and *Washington Post*. It was standard practice, therefore, for the Reagan White House to leak a story to Lou Cannon of the *Post* and to Hedrick Smith of the *Times* overnight with an eye to affecting network coverage the next day.⁷⁹ For the most part, the press was denied access to the President *except* during a daily photo opportunity that was coordinated with the story leaked to the *Times* and the *Post* and carefully planned for maximum political effect. Moreover, during a substantial period of the Reagan presidency, the networks agreed to a White House directive that their reporters not ask questions during the photo opportunity.⁸⁰ In addition to this highly effective form of news management,⁸¹ the Reagan White House distributed high-quality video clips to non-Washington television stations on a daily basis.⁸²

The power of White House news control is even stronger still. If the President lies or says something wrong, the press will not ordinarily⁸³ say the President lied or got it wrong today. Rather they will quote someone on the "other side" who responds. Similarly, in the absence of an obvious blunder, if the White House speaks and major figures in the Congress are silent in response, reporters will usually find it sufficient to report the White House's self-serving version of the President's activities.⁸⁴ Former *Washington Post* Assistant Managing Editor William Greider thus speaks of an

ingrown quality of deference which makes the press unwilling to challenge presidential announcements. As a result, the press will print and broadcast reams and reams of rhetoric they themselves know to be wrong. Sure, they'll challenge him if he's got his facts 180 degrees wrong, but otherwise they're very reluctant.⁸⁵

78. HERTSGAARD, *supra* note 66, at 51.

79. *Id.* at 122-23.

80. *Id.* at 142-43.

81. The tactic was inordinately effective because the press perceived President Reagan to be popular. The slant of White House reporting is substantially affected by journalists' perception of the President's popularity. See ENTMAN, *supra* note 69, at 46-47.

82. ABRAMSON ET AL., *supra* note 35, at 293.

83. For a period during the Reagan presidency, the press reported a number of gaffes, but the press retreated because of the public perception that the press was not being fair. After that, the media rarely mentioned Reagan gaffes. See HERTSGAARD, *supra* note 66, at 148-51.

84. See, e.g., ENTMAN, *supra* note 69, at 5. For the contention that televised criticism of the White House will elicit severe response by the White House, but that printed criticism of the White House will usually be ignored, see GOLDFARB, *supra* note 69, at 62.

85. HERTSGAARD, *supra* note 66, at 67; see also *id.* at 73-75. "Much of even the most conscientious objective journalism consists simply of the 'misstatements' that politicians would prefer their constituents to believe." ERIC ALTERMAN, *SOUND AND FURY: THE WASHINGTON PUNDITOCRACY AND THE COLLAPSE OF AMERICAN POLITICS* 3 (1992). This phenomenon has important consequences for public opinion. As Zaller concludes:

[W]hen elites [as reflected in media coverage] uphold a clear picture of what should be done, the public tends to see events from that point of view, with the most politically attentive

As a result of this pattern of reporting, the President can often dominate national political dialogue.⁸⁶ As Mark Hertsgaard states:

According to the old journalistic truism, a reporter was only as good as his sources. For White House reporters, this raised a troubling dilemma. Most news organizations' definition of proper White House coverage stressed reporting the views and actions of the President and his aides above all else. Thus the officials with whom reporters were, in theory, supposed to have an adversarial relationship were the very people upon whom they were most dependent for the information needed to produce their stories.⁸⁷

In most of the years when Presidents Bush and Reagan occupied the White House, the Congress was not a reliable adversarial source. Lesley Stahl maintained that "one reason press coverage of Mr. Reagan had not been more aggressive was that the Congress 'had not been a source for the press in the whole Reagan administration. They [did not] want to criticize this beloved man.'"⁸⁸ The causes of the Democratic failure to criticize the Republican White House on many domestic economic issues are complex, but campaign finance appears to be especially important. In a real sense, corporations have bought the Congressional Democrats,⁸⁹ and the difference between the two major parties has narrowed considerably. This is important not merely from a legislative perspective, but from the perspective of the national dialogue about policy issues. By and large, reliance on these sources confines the agenda⁹⁰ for public discussion in national politics.⁹¹ As Hertsgaard

members of the public most likely to adopt the elite position. When elites divide, members of the public tend to follow the elites sharing their general ideological or partisan predisposition, with the most politically attentive members of the public mirroring most sharply the ideological divisions among the elite.

ZALLER, *supra* note 74, at 8-9.

86. See GANS, *supra* note 61, at 119 ("The president of the United States has instantaneous access to all news media whenever he wants it; the powerless must resort to civil disturbances to obtain it.").

87. HERTSGAARD, *supra* note 66, at 55; see also ENTMAN, *supra* note 69, at 20 ("Government sources and journalists join in an intimacy that renders any notion of a genuinely 'free' press inaccurate."); HERTSGAARD, *supra* note 66, at 59 (quoting a *Boston Globe* reporter stating that the *New York Times* is "shameless with the fawning profiles of White House officials who will later be leaking stories [to the authors of said profiles]").

88. HERTSGAARD, *supra* note 66, at 68. Despite the conventional wisdom depicting Reagan as an uncommonly popular president, polls show that his average approval rating over the course of his years in office place him fifth among the last nine presidents. LEE & SOLOMON, *supra* note 30, at 148. Despite press reports of a mandate for Reagan, only 27% of the eligible voting public cast a ballot for him in 1980, and his advisors were aware that his proposed policies were well to the right of the American public. See HERTSGAARD, *supra* note 66, at 102, 106.

89. More precisely, the Democrats sold themselves to segments of the business community. See generally FERGUSON & ROGERS, *supra* note 71.

90. By contrast, the spectrum of political discussion is markedly broader in European countries. See HERTSGAARD, *supra* note 66, at 70.

91. The policy issues that are discussed in election campaigns are also largely dictated by the candidates. An important policy question will ordinarily not be an issue in an election campaign unless the candidates make it an issue. Thus, in the 1988 election (though they were unaware of the magnitude of the problem), reporters in America knew that the savings and loan industry would be a major item on the agenda of the next presidency, but neither candidate sought to make it an issue, and the press did not make it an election issue. See generally KURTZ, *supra* note 66, at 47-68. On the other hand, as the focus on Gary Hart in 1988 and Bill Clinton in 1992 shows, the media will raise character issues to the point of obsession even if the other candidates do not. See Tierney, *supra* note 69.

observes, "[W]hen Democrats' criticism of Reagan's program was tepid to nonexistent, the criticism included in news stories to balance administration claims was tepid to nonexistent."⁹²

Of course, President Clinton's occupancy of the White House shifts the national domestic dialogue more to the left than was the case in the prior administrations. Congressional Republicans will continue to offer strong conservative criticism of his policies, and in most cases, there is no particular reason to expect the left to balance those criticisms. Congress has few leftists and a fair assortment of liberals. But pressures to support the President in most cases muffle liberal criticism, and criticism by a few representatives outside the leadership is frequently not regarded as newsworthy. There is no reasonable basis to expect leftist criticism from Congress to occupy a substantial part of the media stage. Although the election of President Clinton should move the national domestic dialogue in a leftward direction, that dialogue has been, and will continue to be, framed in narrow terms.⁹³

C. Foreign Policy Reporting and the "Objectivity" Ethic

The room for criticism of American foreign policy is even narrower. Here, too, reporters are ordinarily forced to rely on sources from the executive branch.⁹⁴ Moreover, Congress in most situations will leave foreign policy decisions publicly unquestioned. Thus, America is routinely portrayed as being on the correct side in its foreign policy dealings—unless "responsible" members of the party not in the White House voice opposition. Then, the press will report the "other side."⁹⁵ Only in rare cases would the point of view of other countries be fully and accurately reported.⁹⁶

92. HERTSGAARD, *supra* note 66, at 119.

93. The early hostile reporting on President Clinton can be attributed to a number of factors that go beyond his job performance: (1) a response to criticism that the press had been hard on Bush and easy on Clinton in the latter days of the campaign (which itself was attributable to Clinton's standing in the horse race); (2) a sense that Clinton was a minority president without a mandate; (3) a response to the existence of powerful criticism by Republican leaders; (4) and anger over the way Clinton treated the national press after gaining the Presidency, by making himself and others around him less accessible than during the campaign and by routing many stories to the local press while circumventing the national press. One of the better discussions of the press' treatment of President Clinton in his early months in the White House is Christopher Georges, *Bad News Bearers*, WASH. MONTHLY, July-Aug. 1993, at 28.

94. See BERNARD C. COHEN, *THE PRESS AND FOREIGN POLICY* 28-30 (1963); Georges, *supra* note 93, at 60-61; see also ENTMAN, *supra* note 69, at 18 ("The least expensive way to satisfy mass audiences is to rely on legitimate political elites for most information.").

95. See MITCHELL STEPHENS, *A HISTORY OF NEWS: FROM THE DRUM TO THE SATELLITE* 267 (1988).

[T]he working definition of objectivity subscribed to by modern journalists demands that they rely on 'responsible' sources for their information and attribute any potentially controversial statements to those sources. But in selecting the persons whose views they will publicize, journalists invariably demonstrate a bias—usually toward those invested by society with some credentials or authority.

Id.

96. See GANS, *supra* note 61, at 42 ("Like the news of other countries, American news values its own nation above all, even though it sometimes disparages blatant patriotism. This ethnocentrism comes through most explicitly in foreign news, which judges other countries by the extent to which they live

CBS Evening News Washington producer Susan Zirinsky sheds light on the point: "Even as an objective journalist, you're an American first and a journalist second You come from a framework to every story, and I'm an American, that's where I come from."⁹⁷ Foreign policy thus becomes a tale told through executive branch eyes, a tale about the war between good and evil rather than a struggle over competing interests. Thus, it is known that America is despised in many countries around the world, but the press provides little information that would help a reasonable reader know why.

Assume, for example, that the United States implements an imperialistic policy in a Latin American country ("Country X") to make it safe for American business.⁹⁸ Assume the American press repeats the State Department perspective that the government's real purpose is to advance the cause of "democracy"—even though the policy is directed against a government whose only real "crime" is ardent nationalism. Why would the press wait for a public official to criticize the government action before it could contradict the State Department?

First, the reporter in Country X might believe the State Department and know little of the particular business investment interests. Reporters who are assigned to a beat requiring regular reliance on the same sources tend to ally themselves with those sources, to see the world through their eyes.⁹⁹

Even if the reporter disbelieved the State Department, by contradicting the State Department in this context, the reporter would risk being excluded from his or her most consistent source of information about Country X. This risk is not to be taken lightly.¹⁰⁰

Even if the reporter submitted a report critical of the State Department, the particular media outlet could have a number of concerns in using the report. The mainstream press is particularly anxious to maintain an image of objectivity. If it is going to criticize government policy on its own in a context that could generate substantial controversy, it will demand quite

up to or imitate American practices and values"); see also MICHAEL PARENTI, *INVENTING REALITY: THE POLITICS OF THE MASS MEDIA* 113 (1986).

97. HERTSGAARD, *supra* note 66, at 64.

98. This is not a bizarre hypothetical. See generally GABRIEL KOLKO, *CONFRONTING THE THIRD WORLD: UNITED STATES FOREIGN POLICY, 1945-1980* (1988).

99. See GANS, *supra* note 61, at 270-71.

These days journalists and government are commonly thought to be in an adversary relationship, although government is not an adversary most of the time. As the major source of news, it is in many ways a member of the journalistic team; and even during the Watergate years, journalists continued to cooperate with many segments of the government, including the White House.

The principal source of cooperation is built into the source considerations, through their skew toward official sources; and into the symbiotic relationship between beat reporters and their sources, which inhibits reporters from displeasing them.

Id.; see also *id.* at 132-36.

100. See *id.*; KEANE, *supra* note 56, at 102-03. For a discussion of the exclusion of access and other techniques public officials use to discourage or retaliate against unfavorable reporting, see GEORGE C. EDWARDS, *THE PUBLIC PRESIDENCY: THE PURSUIT OF POPULAR SUPPORT* 128-33 (1983); and MICHAEL B. GROSSMAN & MARTHA J. KUMAR, *PORTRAYING THE PRESIDENT: THE WHITE HOUSE AND THE NEWS MEDIA* 280-81, 288-93 (1981).

substantial evidence.¹⁰¹ On the other hand, if one of its competitors files a critical story, its standards might then be relaxed. In that circumstance, its objectivity could be questioned if it did not run a story about the controversy.

Although journalists think of objectivity as a professional consideration, there is also a powerful business justification for the appearance of objectivity in the mainstream media. As Mitchell Stephens observes:

[A]s so many newspapers fell victim to competition with radio and television in the twentieth century¹⁰² [it] would no longer make sense to tailor a newspaper for Republicans or Democrats or Progressives. Those newspapers that would survive—often the only papers in their towns—would seek to maintain a broadly based readership, which meant they could not afford to offend large groups of potential customers with overtly partisan coverage. Corporate advertisers—concerned about the impact controversy might have on sales—would also prove more comfortable associating themselves with newspapers that maintained . . . this “appearance of neutrality.”¹⁰³

Obviously, neutrality and objectivity are relative terms in a profession necessarily devoted to a process of editing. In a world of scarce resources, all sides cannot be presented, and the represented views will tend to be those that could be expected to be widely held.¹⁰⁴ Douglas Kellner puts a radical spin on the point:

In general, television tends to reproduce the positions of the dominant hegemonic political forces of the era simply because, in its zeal to win good ratings and big profits, it gravitates toward what it believes is popular. As a consequence, it tends to reinforce and reproduce the dominant ethos . . . [I]n the event of intra-ruling-class conflict, television will tend to reproduce it.¹⁰⁵

According to Kellner, “The opinion spectrum that dominates television thus includes only those liberals and conservatives who tacitly agree that all discourse must take place within the framework of the existing system of production and representative democracy, from which more radical views are rigorously excluded.”¹⁰⁶

Whatever the explanation for the comparative absence of radical voices on American television, it seems obvious that they *are* comparatively absent. Indeed, during the Gulf War, of the 878 on-the-air sources on the network evening news shows, only *one* was a representative of a peace

101. See GANS, *supra* note 61, at 274; see also HERTSGAARD, *supra* note 66, at 72.

102. For persuasive commentary suggesting that the real culprit may have been advertising, see Baker, *supra* note 45, at 2103-32; see *id.* at 2131 (“In sum, there are economic reasons to expect, historical evidence to suggest, and contemporary consciousness to indicate that both the decline of political partisanship and the rise of objectivity were at least partly caused by newspapers’ need to gain the circulation on which advertising income depends.”).

103. STEPHENS, *supra* note 95, at 262; see also ABRAMSON ET AL., *supra* note 35, at 14.

104. STEPHENS, *supra* note 95, at 262.

105. DOUGLAS KELLNER, TELEVISION AND THE CRISIS OF DEMOCRACY 47-48 (1990).

106. *Id.* at 9.

organization.¹⁰⁷ At no time during the first month of *Nightline*'s conversations about the war did a single U.S. guest argue against the decision to send American soldiers to the region.¹⁰⁸

Even during calmer times, a study of forty months of *Nightline* shows found that "representatives of civic and community organizations, popular social movements, [and] minority communities" were essentially absent.¹⁰⁹ The report concluded that "*Nightline* serves as an electronic soapbox from which white, male, elite representatives of the status quo can present their case. Minorities, women, and those with challenging views are generally excluded."¹¹⁰

The posture of the media is that of an overseer keeping tabs on competing "responsible" antagonists.¹¹¹ This posture is itself ideologically charged. As Herbert Gans observes in his careful study of the news: "The political values in the news . . . are dominated by the same principle; in fact, insofar as the news has an ideology of its own, it is moderate."¹¹² Journalists as a group tend to be moderate.¹¹³ More precisely, journalists of the mainstream media do not think of themselves as ideological,¹¹⁴ and they naturally tend to distrust ideologues of both the far left and the far right.¹¹⁵

In describing the treatment of radicals by the mainstream media, Gans stated: "All the major news media approve the moderate core, which includes liberals, moderates, and conservatives; adherents to other positions are treated less favorably, but generally those on the Right are labeled more politely than those on the Left."¹¹⁶

107. Jim Naureckas, *Gulf War Coverage*, 4 EXTRA!, May, 1991, at 3, 5. Apart from the cheerleading coverage afforded to the war, the mainstream media refused to join a legal challenge questioning Pentagon censorship during the war. Indeed, the major news media did not report the existence of the lawsuit until after the war was over. MARTIN A. LEE & NORMAN SOLOMON, UNRELIABLE SOURCES: A GUIDE TO DETECTING BIAS IN NEWS MEDIA, at xvi (2d ed. 1991).

108. LEE & SOLOMON, *supra* note 30, at xxi.

109. *Id.* at 27.

110. *Id.*; see also ABRAMSON ET AL., *supra* note 35, at 29 ("[M]inority and novel political views are the ones least in the position to attract television attention or to buy promotional time. The range of political programming on television thus tends to be fairly homogeneous—aimed at the tastes and preferences of the widest possible mass audience."). Are the typical talk show hosts right-wingers or sensationalists or both? Why?

111. There is some evidence that progressive spokespersons have been denied access to television and radio public affairs programs because of a refusal of Defense Department guests to appear with peace proponents. See LEE & SOLOMON, *supra* note 30, at 105.

112. GANS, *supra* note 61, at 52; see also *id.* at 67-68.

113. See *id.* at 212. An ABC News Washington bureau chief observed in the mid-1980's: "Today as never before our reporters are part of the town's elite, which seems a reasonable factor in explaining why there is less of an adversarial tone in the coverage [of Washington]." HERTSGAARD, *supra* note 66, at 44.

114. GANS, *supra* note 61, at 190-93.

115. *Id.* at 190-94; HERTSGAARD, *supra* note 66, at 80 ("The political sensibilities of people in network television are mainstream, traditional and conservative; neither far left nor far right. . . . We share the same basic assumptions of bankers, lawyers and the rest of the establishment. You ain't going to see a bunch of radicals coming in here.") (quoting Tom Yellin, one of the original producers of *Nightline*).

116. GANS, *supra* note 61, at 30-31.

From the perspective of the left, what Gans said at the outset of the 1980's is even bleaker today. Liberals are no longer part of the media's perceived moderate core,¹¹⁷ but are closer to the fringe of that core; radicals are virtually nonexistent.¹¹⁸ It is not surprising to observe a dearth of radical perspectives in the mainstream press.

D. Corporations

The dearth of radical perspectives is perhaps most conspicuous when one considers the media's treatment of corporations, whether in entertainment programming or public affairs reporting. Recall that the media are dominated by advertising. Important advertisers have demanded a pro-business atmosphere:

Procter & Gamble, which spends over a billion dollars a year on advertising, once decreed in a memo on broadcast policy: "There will be no material that will give offense, either directly or indirectly to any commercial organization of any sort." Ditto for Prudential Insurance: "A positive image of business and finance is important to sustain on the air."¹¹⁹

Entertainment programming largely meets these requirements, but entertainment programming is not an unmitigated corporate paradise. Business executives are frequently portrayed in derogatory terms on entertainment television. The legendary *Dallas* character J. R. Ewing, for example, was something less than a goody-two-shoes.

Even though powerful businessmen are frequently portrayed in derogatory ways, the social message is nevertheless one of mere individual corruption rather than a radical indictment of the entire political structure. As Todd Gitlin observes, "Structures rarely exist; culprits do."¹²⁰ Moreover, the quest for riches is not called into question. Even though J. R. Ewing was morally impoverished, millions of viewers were encouraged to enjoy the sumptuous surroundings. We can hate the rich but still want the riches.

Business corporations might prefer that all such stereotypes be excised from the air, but television is itself a business. *Dallas* stayed on the air so long as audiences were willing to watch and advertisers were prepared to pay. Conflicts of corporate interest persist even in a structure that is largely hospitable to corporate interests.

117. As Goldfarb observes, the battle of the conservatives "has escalated. It is no longer primarily concerned with Godless communism but with liberalism." GOLDFARB, *supra* note 69, at 111.

118. Even ten years ago, Gans wrote:

Although domestic politicians who criticize governmental welfare measures as socialistic or communistic no longer get the attention they once did, domestic news also remains critical of American socialism. More correctly, the news ignores it, for socialist critiques of the American economy, as well as the activities of America's socialist parties and informal groups, are not newsworthy.

GANS, *supra* note 61, at 47-48.

119. LEE & SOLOMON, *supra* note 30, at 61.

120. GITLIN, *supra* note 46, at 270.

The same is true of public affairs coverage of corporations.¹²¹ Morton Mintz, a *Washington Post* reporter for twenty-nine years, complains of a "chronic tilt [that] distorts mainstream media coverage of grave, persisting, and pervasive abuses of corporate power."¹²² Similarly, Frances Cerra, who for six years served as the consumer reporter for the *New York Times*, observed that "The *Times* never wanted stories critical of consumer treatment by major corporations."¹²³ Of course, many critical stories have been published or broadcast.¹²⁴ Critical discussions of corporate activity are often triggered when public officials have focused attention upon them,¹²⁵ but many of those same public officials rely on corporate campaign contributions in order to get reelected. In the absence of government attention of one sort or another, the national media will rarely press for reform of corporations.¹²⁶

Nonetheless, if a government agency or a "responsible" researcher criticizes a corporation or its product, the media will frequently give substantial exposure to such a charge. And, during some periods, many such charges have created a negative impression of business as a whole. Little mystery should surround the question of why a corporate conglomerate would broadcast stories that might be detrimental to long-term corporate interests. Short-term profits explain much, and all corporations are not hurt alike. Indeed, when corporate interests collide, the competitors will often seek government assistance, and the news will not be far behind.

The question is: What discourages more critical stories and accounts for the "chronic tilt [that] distorts mainstream media coverage of corporate power"?¹²⁷ Some of the reasons are obvious. First, libel laws discourage aggressive media reporting. Corporations often have the resources and the will to bring a lawsuit. Even if the plaintiff ultimately loses the lawsuit, the press defendant will, despite insurance, spend substantial amounts defending the lawsuit and will have editors and reporters tied up in a grueling legal discovery process. Before publishing a hard-hitting story about a wealthy potential plaintiff, the media are encouraged to think hard. The so-called "chilling effect" of libel suits is a reality.

Second, corporate abuses are not easily unearthed by the press. In the absence of government sources or reports in scholarly journals, the press must turn to investigative reporting. Such reporting is expensive and, therefore, rare.

More difficult to assess is the role that corporate ownership of, and corporate advertising in, the media plays in discouraging corporate criticism.

121. See generally COLLINS, *supra* note 45; Baker, *supra* note 45, at 2144-53.

122. Morton Mintz, *A Reporter Looks Back in Anger*, PROGRESSIVE, Dec. 1991, at 29, 29.

123. *Id.* at 32.

124. *60 Minutes* has broadcast many stories critical of particular businesses. Here again, culprits exist, but the structure is not on trial, nor are valuable advertisers.

125. LEE & SOLOMON, *supra* note 30, at 185.

126. Of course, "reform" of corporations is not the goal of radicals. But the corporate media's relative silence about abuses arising in a capitalist system is itself the sort of abuse that radicals would decry. As I discuss in the next section, these problems are not easily solved.

127. Mintz, *supra* note 122, at 29.

Advertiser pressure, of course, runs to prevent criticism of its own products. As Bagdikian reports: "The mainstream news media postponed for more than fifty years full public awareness of the hidden dangers of the medically known threat to public health from tobacco. They did it by self-censorship and by deliberate obfuscation of authoritative medical reports. They did it to protect a major advertiser."¹²⁸ More recently, the reporting of the *New York Times* has been soft on the automobile industry because of the need for advertising by automobile manufacturers.¹²⁹ Indeed, Arthur Sulzburger, then the publisher of the *New York Times*, "admitted that he had leaned on his editors to present the auto industry's position because it 'would affect advertising.'"¹³⁰ Turner Catledge, the former Managing Editor of the *New York Times*, has written that he frequently carried out Sulzburger's directives without indicating that the policy was emanating from the Publisher. Reporters thus may often have been unaware that editorial policy was the product of the Publisher's intervention.¹³¹

Why would publishers want to intervene—apart from wanting to avoid lawsuits and to secure a favorable atmosphere for advertisers? Some media critics speak in conspiratorial terms about the desire of corporate managers to maintain their position of class power in a capitalistic system. I doubt this is an important factor. But I do think it relevant that the owners of the press are largely conservative, and I think it is natural for owners of the press, whether liberal or conservative, to want the paper to reflect their general view. Otis Chandler of the *Los Angeles Times* put it succinctly: "I'm the chief executive. I set policy and I'm not going to surround myself with people who disagree with me . . . [.] I surround myself with people who generally see the way I do."¹³²

In the end, the news media tend to cover those arguments that divide corporate interests, but not those arguments directed against that which unites them. Whether this is good or bad, the business climate created by the structure of the American communications media is as good as business could

128. BAGDIKIAN, *supra* note 55, at x; see also *id.* at 42 ("In the years after World War II, no standard newspaper in the country would accept ads from Consumers Union because its magazine, *Consumer Reports*, tested and reported, sometimes negatively, name brands advertised in Washington."); Rob Cunningham, Comment, *Cigarette Advertising and Freedom of Expression: The Case for the Tobacco Products Control Act*, U. TORONTO FAC. L. REV. 304, 322 (1990) (citing differences between coverage of tobacco health issues among magazines that relied heavily on tobacco advertising and coverage in those that did not).

129. LEE & SOLOMON, *supra* note 30, at 64.

130. *Id.* (quoting Arthur Sulzburger).

131. *Id.* at 96. Sometimes the intervention is more obvious. CBS Evening News Producer Richard Cohen reports that, after CBS came under new management in 1982, the new managers "had a view of what kind of news made for good ratings: more features, make it light and bright, soften it up. Don't be negative about the President, people don't want to hear that." HERTSGAARD, *supra* note 66, at 163; see also ABRAMSON ET AL., *supra* note 35, at 285-86. The drive for ratings was successful, and the other networks began to imitate CBS. See HERTSGAARD, *supra* note 66, at 176.

132. LEE & SOLOMON, *supra* note 30, at 93.

reasonably desire. The airwaves are organized as a medium to attract consumers, and criticism of corporate power is kept to a minimum.¹³³

Even if the media were not financed by advertisers, even if it were not owned by powerful corporations, even if it did not depend upon people in power for much of its product, the *mass* media are constrained by their financial need to appeal to a mass audience. This need itself constrains the issues discussed. Relatively few Americans are politically progressive. Moreover, many Americans are offended by leftist views. Millions of Americans tend to value dissent in the abstract and yet recoil from it in the concrete. They prefer to avoid challenges to their deepest views. From a programming perspective, this is not trivial. No institution in the mass media can get rich offending a mass audience.¹³⁴

The media are often characterized as a fourth estate functioning to *criticize* the status quo. But if the picture I have painted is largely correct, the media, without engaging in a conspiracy, largely function to instead *preserve* the status quo.¹³⁵ By arguing that the mass media discriminate against the left, I have not denied that the media discriminate against parts of the political right. Criticism from the left and parts of the right are marginalized. The power of the media to preserve the status quo is especially effective because formal censorship is rare, because the media often expose corporate and government abuses, and because the press so frequently proclaims itself as free.¹³⁶ Hidden in each of these dimensions are a set of political, cultural, and economic factors that guide our free press not only away from the concerns of liberals and the radical left, but also from the kind of informed debate that is symbolized by our national commitment to freedom of the press.

II. THE IMPACT OF THE FREE SPEECH PRINCIPLE

The free market is not a fair market; indeed, it is a distorted market. Power sets the agenda and constructs the range of issues to be discussed. By

133. See, e.g., GANS, *supra* note 61, at 20 ("[A] decade's content analysis of the news would not easily show the extent to which the economy is dominated by oligopolies."). "[T]he news rarely notes the extent of public subsidy of private industry, and it continues to describe firms and institutions which are completely or partly subsidized by government funds as private—for example, Lockheed" *Id.* at 45. Of course, business scandals are frequently reported, much to the chagrin of chambers of commerce and conservative think tanks who charge that the media are unfair to business. For a powerful response, see Peter Dreier, *The Corporate Complaint Against the Media*, in *AMERICAN MEDIA AND MASS CULTURE* 64-80 (Donald Lazere ed. 1987).

134. The print press has more freedom here. If people do not like the editorial line of a newspaper, they may continue to buy it because of political columnists they like or the bridge column or the movie ads. If they are offended by abortion references in a television program, however, they will most likely turn to another channel.

135. See HERTSGAARD, *supra* note 66, at 77 ("The press, myself included, traditionally sides with authority and the establishment.") (quoting ABC reporter Sam Donaldson); see also IYENGAR & KINDER, *supra* note 69, at 133 ("Television news may be objective, but it is far from neutral. The production of news takes place within boundaries established by official sources and dominant values. . . . [T]elevision news [is] an inherently cautious and conservative medium, much more likely to defend traditional values and institutions than to attack them.").

136. EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* 1 (1988).

preventing government intervention to correct or mitigate such market failures, the Market Capture Thesis postulates that the free speech principle does not serve the interests of the left. But this begs an important question: Whether government intervention would make the unfair market better or worse than it already is. If the powerful control the marketplace with iniquitous consequences for the left, why would not the powerful control the state and make matters worse? In his attempt to promote the Market Capture Thesis, Professor Schauer concedes the possibility that the powerful will capture the government and make matters worse (though he is puzzled as to why people on the left would not also have worries of similar depth in the economic market), but he also maintains that "the number of good interventions may still be sufficient to produce more good results than would have been the case with non-intervention."¹³⁷ The obvious tentativeness of that conclusion ("may still be sufficient"), however, forces Professor Schauer to a final contention of the "there may be reason to believe" variety,¹³⁸ rather than a firmer thesis. In response, I argue that there is insufficient reason to suppose that the left acts against its interests in supporting the free speech principle, even assuming that that principle is a laissez-faire principle.

Part of my analysis proceeds from my discussion of the mass media. The mass media are obviously quite influential,¹³⁹ and control of it is important. Moreover, it is reasonable to expect that the mainstream press will continue to discriminate against the left so long as its present structure remains in place. But control of the mass media in their current structure is not monolithic,¹⁴⁰ and the mainstream press is not the only press. Even if mass media power were monolithic, power in general is not.¹⁴¹ The content of the mass

137. Schauer, *supra* note 7, at 954.

138. *Id.* at 957 ("[T]here may be reason to believe that those who are politically or socially disadvantaged would urge [free speech] protection with caution, and that those who are politically or socially advantaged would welcome this greater protection with some enthusiasm.").

139. AMERICAN MEDIA AND MASS CULTURE, *supra* note 133; see KEANE, *supra* note 56, at 38; ZALLER, *supra* note 74.

140. Many of the players (advertisers, owners, government officials, other sources) have power, and their agendas can compete. Sometimes that competition introduces themes of benefit to the left. Leaving the left aside, the question of whether media power on balance supports liberals or conservatives varies with the context (Franklin Roosevelt's presidency was no boon for conservatives, and I suspect that conclusion would have held even under modern media conditions). With respect to the left, the context has yet to vary sufficiently to make a difference.

141. See generally MICHEL FOUCAULT, 1 THE HISTORY OF SEXUALITY 92-93 (1980). Foucault writes: [P]ower must be understood in the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organization; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallization is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies. Power's condition of possibility, or in any case the viewpoint which permits one to understand its exercise, even in its more "peripheral" effects, and which also makes it possible to use its mechanisms as a grid of intelligibility of the social order, must not be sought in the primary existence of a central point, in a unique source of sovereignty from which secondary and descendent forms would emanate; it is the moving substrate of force relations which, by virtue of their inequality, constantly engender states of power, but the latter

media is by no means a perfect predictor of what people will believe. As John B. Thompson writes: "[W]e cannot claim or pretend to read off the consequences of media messages by attending to the structure and content of these messages alone."¹⁴² Progressive change from the perspective of the left¹⁴³ typically does not come from independent agitation from the mass media¹⁴⁴ or via gifts from political power brokers; progressive change is the culmination of grass-roots agitation and organizing.¹⁴⁵ As James MacGregor Burns and Stewart Burns conclude in a book that traces centuries of rights organizing: "Advances in rights have been achieved far more by grass-roots protesters, movement activists, and bold leaders—such as Martin Luther King, Jr. . . . than by even the most well-meaning political brokers of those days. Transactional leaders may be still less relevant in the years ahead . . ."¹⁴⁶

To the extent that leftist politics depends upon social movements, grass-roots protests and activities, the free speech principle is vital.¹⁴⁷ Without the free speech principle, government could freely squelch anti-war protesters and civil rights protesters.¹⁴⁸ Of course, the government has frequently censored or vilified the left despite the free speech principle. Consider the treatment of anti-war protestors in World War I, the Palmer raids, the House Un-American

are always local and unstable.

Id.

142. JOHN B. THOMPSON, *IDEOLOGY AND MODERN CULTURE* 24 (1990). See generally JOHN FISKE, *UNDERSTANDING POPULAR CULTURE* (1989). The theme recurs in many of the essays collected in *CULTURAL STUDIES* (Lawrence Grossberg et al. eds., 1992).

143. Here is where liberals often diverge from the rest of the left. Liberals frequently look to governmental leaders for solutions; the rest of the left has a variety of theories of change, but they place considerably more importance upon grass-roots democratic organizing. See, e.g., RICHARD FLACKS, *MAKING HISTORY: THE RADICAL TRADITION IN AMERICAN LIFE* (1988); TOM HAYDEN, *TRIAL* 150-68 (1970); Paul Potter, *Intellectuals and Power*, in *THE NEW STUDENT LEFT* 16, 20 (Mitchell Cohen & Dennis Hale eds. 1967).

144. For activist advice on the manipulation of the mass media, see CHARLOTTE RYAN, *PRIME TIME ACTIVISM* (1991).

145. The left is deeply divided about the results of social movements. Liberals tend to see social movements as spurring progressive change, though many of them are uncomfortable with some forms of collective resistance that most of the radical left find appropriate. On the importance of such resistance to the left, see TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* 84-85 (1987). On its impact, see Francis F. Piven & Richard A. Cloward, *Normalizing Collective Protest*, in *FRONTIERS IN SOCIAL MOVEMENT THEORY* 301 (Aldon D. Morris & Carol M. Mueller eds. 1992). Many radicals see the results of social movements as governmental cooptation which takes the life out of social movements without substantially changing the character of the power structure; others produce more optimistic assessments. For thoughtful discussion of this issue, see FLACKS, *supra* note 143, at 243-54. See generally CHARLES J. STEWART ET AL., *PERSUASION AND SOCIAL MOVEMENTS* (2d ed. 1989).

146. JAMES M. BURNS & STEWART BURNS, *A PEOPLE'S CHARTER* 453-54 (1991). On social movements generally, see *FRONTIERS IN SOCIAL MOVEMENT THEORY*, *supra* note 145.

147. See generally BAKER, *supra* note 24, chs. 5 & 6.

148. Whatever one thinks of the importance of grass-roots organizing as a source of change, I doubt the mass media are more powerful now than it was in the 1960's. To be sure, newspapers are more likely to be part of a chain, and ownership of newspapers is less diverse. But the rise of video alternatives to the networks has fragmented the mass audience in the broadcasting medium (though network audiences are still substantial). In various stages of media technology, a number of social movements have received substantial attention, for example, feminism, ecology, gay rights, and animal rights.

Activities Committee, and the reign of Joseph McCarthy.¹⁴⁹ Consider also the continued media red baiting, a baiting that now extends to all those on the left for committing a sin which ironically parades under the title of "political correctness," ironic because the only way to commit the sin is to express views that are to the left of that which is regarded as orthodox in the mainstream media.

The extent to which the free speech principle has actually protected the left in the past is a fair subject for debate;¹⁵⁰ nonetheless, it seems that the free speech principle is in many ways more solidly anchored in our culture today than it has been in prior times.¹⁵¹ It is hard to imagine, for example, that a conservative Supreme Court would have upheld the right of a leftist to burn a flag during World War I or the McCarthy era. Indeed, the constituency for free speech is broader today than it has ever been, in part because vested business interests have a stake in its strength.

But the issue of the salience of free speech goes beyond that of *protecting* the left. When the government engages in repression, the free speech principle itself becomes a basis for organizing grass-roots movements. The Free Speech Movement at Berkeley did not come from nothing.

If the free speech principle is important to the left in protecting and forming grass-roots movements,¹⁵² it also furthers the left's interests with respect to the media, despite the factors causing the media to incline in so many circumstances against the left. Whether or not government is equipped to deal with the anti-leftist biases of the press, solving this problem is not, and has

149. On political repression in America, see generally ROBERT J. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA* (1978); BUD SCHULTZ & RUTH SCHULTZ, *IT DID HAPPEN HERE* (1989). Many liberals have contributed to the assaults on leftist social movements. Liberals played a substantial role in the treatment of World War I protestors, see RICHARD POLENBERG, *FIGHTING FAITHS* (1987) (liberals controlled the War Emergency Division of the Justice Department), and followed along with the censorship of McCarthy and, of course, Harry Truman. If one sticks with Professor Schauer's terminology, it would have to be said that many of those who voted for Clinton and Dukakis—who think of themselves as liberals—have not exhibited devotion to the free speech principle when it counted. See ELLEN W. SCHRECKER, *NO IVORY TOWER* (1986); Manning Marable, *A New American Socialism*, *PROGRESSIVE*, Feb. 1993, at 20, 21-22. Of course, many liberals did exhibit such devotion, and many of those paid the price.

150. Professor Schauer does not enter the debate. He proceeds entirely from a philosophical perspective, a perspective which assumes that the free speech principle will be respected.

151. Some might argue that this means that the left no longer needs judicial review and is unlikely to benefit from the Rehnquist Court. See Becker, *Conservative Free Speech*, *supra* note 12. Notice that my argument in this Article is that the free speech principle benefits the left, not that judicial review of free speech cases benefits the left. Obviously, the Rehnquist Court could manipulate the free speech principle to damage the left. In many cases, it has. See generally KAIRYS, *supra* note 16.

152. More generally, critical race theorists have argued that rights have been an important tool for mobilizing the disempowered and their allies. As Robert A. Williams, Jr., argues, "The frequent attacks by CLS ["Critical Legal Studies" advocates] on both rights and entitlement discourse represent direct frontal assaults on the sole proven vehicle of the European-derived legal tradition capable of mobilizing peoples of color as well as their allies . . ." Williams, *Taking Rights Aggressively*, *supra* note 18, at 121; see also Dalton, *supra* note 18; Delgado, *supra* note 18; Williams, *Alchemical Notes*, *supra* note 18. Other leftist critics of CLS have argued in the same vein. See Schneider, *supra* note 18; Sparer, *supra* note 18. In turn, the recognition that rights rhetoric is important in the building of activist movements has been conceded by some critical theorists who are otherwise critical of rights. See, e.g., Kennedy, *Critical Labor Law Theory*, *supra* note 18, at 505-06; Freeman, *supra* note 18, at 332-33.

never been, a major mission of the government. The free speech principle has not interfered with any government initiatives plausibly addressing these problems in a major way. On the other hand, the free speech principle, if followed broadly, would protect the press¹⁵³ from government initiatives that the left has reason to fear, for example, prior restraints, defamation suits, interference with confidential sources, and searches and seizures of press materials. These government initiatives can damage other political perspectives, as well, in many circumstances, but the suggestion that liberals or the left should consider the free speech principle as a detriment, on balance, is more contestable than might initially appear.

A laissez-faire free speech principle, on the other hand, could prevent a liberal government from enacting many forms of campaign reform, most forms of mass media access regulation,¹⁵⁴ and most forms of hate speech and pornography regulation. The left would generally regard the limits on campaign reform and mass media access regulation to be serious costs of the free speech principle (assuming that such reforms and regulations were not incumbent protection programs).¹⁵⁵ The left, of course, is divided about hate speech and pornography regulation and would be divided about the merits of the free speech principle in that context.

From my own perspective, a laissez-faire free speech principle has costs for the left, and estimating the relative seriousness of those costs depends upon an assessment of the importance of the regulations envisioned, their likely impact, and their likely enforcement. It also depends upon an assessment of how often liberals would be in power and on the speech agenda they would likely follow.¹⁵⁶ Since I assume that the free speech principle will apply in good times and in bad, and since conservatives are likely to control the executive branch at least as often as liberals, any abandonment of the free speech principle on the ground that such abandonment would bring substantial benefits smacks of a riverboat gamble. Although I admit the free speech principle has costs, I think the Market Capture Thesis underestimates the benefits of retaining the free speech principle to the left and to those liberals who value social movements and a free press.¹⁵⁷

153. The left would be particularly, but not exclusively, concerned with threats to the progressive press.

154. Such an interpretation of the principle, albeit a popular one in the commentary, overlooks the extent to which government has power to manage its own resources. See Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 587 n.122, 644-45 (1980). That is, broadcasters are licensees of public airwaves. This does not mean, however, that government could commandeer all of the public airwaves, see generally BAKER, *supra* note 24, at 258-63; Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. L. REV. 990 (1989), or that there are no limitations on how government manages its resources. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS* (1983); Shiffrin, *supra*.

155. Some members of the left might favor incumbent protection programs, if the incumbents were the right people. Other members of the left would regard a commitment to democracy as more important.

156. I do not assume that the left will take control of the government in my lifetime. Moreover, I assume that it is in the left's interest for liberals rather than conservatives to be in power.

157. Liberals divide on important free press issues, defamation law in particular. Liberals and the left divide over the question of the relationship between privacy and the press.

III. THE FREE SPEECH PRINCIPLE

The Market Capture Thesis assumes that the free speech principle is libertarian (that is, it does not interfere with the market),¹⁵⁸ but that assumption is open to serious question. First, I would guess that the overwhelming majority of modern conservatives are not libertarian.¹⁵⁹ To be sure, they are less likely than the left to intervene in the marketplace (still there is something to John Kenneth Galbraith's quip that conservatives practice socialism for the rich and capitalism for the poor). But conservatives have been prepared to intervene in the market to combat obscenity and perceived threats to order or to national security. Of course, libertarians would not subscribe to any such intervention, but the "modern conservatives" who sit on the Court do not appear to include *any* libertarians. Thus, modern conservatives exhibit the converse side of the problem Professor Schauer associates with liberals: How does one justify laissez-faire in the economic marketplace (if we accept that assumption about modern conservatives) while proposing intervention in the intellectual marketplace?

Enough about modern conservatives. What about liberals, the left, and the free speech principle? Is it true that liberals and the left resist intervention in the intellectual marketplace while accepting intervention in the economic marketplace? Unquestionably, some do, but many do not. Indeed, many liberals want to intervene in the intellectual marketplace, for example, to promote children's television, to stop the wealthy from dominating election campaigns, to bring greater fairness to broadcast coverage of issues in the mass media, or to enact hate speech regulations.

Liberals or persons on the left who take these positions either accept the laissez-faire free speech principle but think the importance of the principle is outweighed, or entertain a different interpretation of the free speech principle, or both.

Liberals and the left certainly need not confine themselves to a laissez-faire conception of the First Amendment. Owen M. Fiss, for example, arguing from a liberal perspective, maintains that the "first amendment does not supply considerations in favor of laissez faire, but rather points toward the necessity of the activist state."¹⁶⁰ In his view, the First Amendment embodies our commitment to robust public debate, and if that commitment is to be realized, the state must stand on an "equal footing with other institutions and [must be]

158. Some libertarians' views are more complicated than a laissez-faire principle suggests. C. Edwin Baker, for example, subscribes to a strong principle of human liberty on primarily non-consequentialist grounds, but does not include for-profit corporations within the liberty principle. His approach allows for substantial intervention in the market. See BAKER, *supra* note 24.

159. On the other hand, Professor Schauer's thesis does not depend upon the association of conservatives with libertarians. It is enough for his purposes to associate conservatives with concentrations of power. See Schauer, *supra* note 7. Among conservatives, it may be that libertarians are more likely to oppose policies that assist concentrations of power.

160. Owen M. Fiss, *Why the State*, 100 HARV. L. REV. 781, 783 (1987); see also Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). For a rich elaboration of a New Deal for speech, see SUNSTEIN, *supra* note 45.

allowed, encouraged, and sometimes required to enact measures or issue decrees that enrich public debate, even if that action entails an interference with the speech of some and thus a denial of autonomy."¹⁶¹ Therefore, Fiss argues that broadcasters, for example, should not have been permitted to deny access to those who sought to oppose the Vietnam war.¹⁶² The interference with the broadcaster's institutional autonomy was justified by the free speech principle's interest in public debate. There is no necessary libertarian spin to the First Amendment principle.

Nor is Fiss's alternative the only rival to the principle of *laissez-faire*. As I have elsewhere argued,¹⁶³ the free speech principle is not best interpreted by reference to a free marketplace of ideas or even of a rich and robust public debate. A starting assumption (drawing from John Stuart Mill and Ralph Waldo Emerson, among others) might better be that truth does not easily emerge in the marketplace of ideas. Power contributes to the construction of knowledge, and the incentives to conform are great. If principles like separation of powers and federalism serve to combat concentrated power, the First Amendment serves to encourage and protect those who speak out against established customs, habit, institutions, and authorities—whether or not they inhabit the public sphere.

On this understanding, the First Amendment spotlights a different metaphor from that of the marketplace of ideas or the richness of public debate; instead, it supports the American ideal of protecting and supporting dissent by putting the dissenter at the center of the First Amendment tradition. Of course, this conception protects left-wing dissenters as well as right-wing dissenters, but it has a political tilt against the powerful. In the dissent model, business corporations and commercial speakers have less of a claim to be at the heart of the First Amendment than they would if the marketplace of ideas were our guiding metaphor. Flag burners would come to be understood as being entitled to First Amendment protection, not so much because there is an "idea" that needs to be protected (what was Gregory Johnson's¹⁶⁴ idea?), but because their expression is at the heart of American dissent. So too, speakers on this model would have strong claims of access to government property, to shopping centers, and to the mass media. In short, the dissent model provides not only for the negative liberty of protecting dissent, but also illuminates the areas where government intervention is justifiable,¹⁶⁵ indeed in many instances required.¹⁶⁶

161. Fiss, *supra* note 160, at 786.

162. *Id.* at 793 (citing *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)).

163. SHIFFRIN, *ROMANCE*, *supra* note 20.

164. *Texas v. Johnson*, 491 U.S. 397 (1989).

165. It does not solve all problems by any means. Specifically, the analysis of hate speech issues is quite complicated using a dissent lens. I think that some stringent hate speech regulations are defensible, but that is for another day.

166. Professor Schauer argues that one virtue of the *laissez-faire* principle is that it is easy for the public to understand. Schauer, *supra* note 7, at 955. But there is no reason to believe that the public would find it appreciably more difficult to understand a free speech model based on a rich public debate or, as I would prefer, on the dissenter. If one is to contemplate an unthinking public, the image of the

I do not propose to elaborate on these suggestions here. Presumably, I have said enough to indicate that some principles are better for the left than others. Nonetheless, as I have suggested, even the laissez-faire principle serves the left more than the Market Capture Thesis allows.

Finally, I do not believe that the rightward drift of arguments surrounding the free speech principle has much to do with the free speech principle itself. The free speech principle does not interpret itself. The rightward drift of argument can be understood neither by searching for an inherent meaning of the free speech principle nor even by seeking to assess its political tilt. We would make more progress if we merely recalled the name of the Chief Justice of the United States: William H. Rehnquist.

I have not sought to argue that the free speech principle serves the left in its interpretation by a conservative Court. Rather, I have argued that the First Amendment is an important cultural force and political force of its own wholly apart from the Court. Moreover, despite conservative control of the Court, the rights of business corporations in election campaigns are sharply limited,¹⁶⁷ tobacco companies have no free speech right to hawk their wares,¹⁶⁸ shopping centers have no First Amendment right to exclude demonstrators,¹⁶⁹ broadcasters have no First Amendment right to exclude access to the airwaves,¹⁷⁰ and the jury is still out on hate speech issues.¹⁷¹ Indeed, Chief Justice Rehnquist has carried the banner on some of these issues. Power is complicated. So are conservatives. So is law.

But some things are simple. Like it or not, the free speech principle is here to stay. 'Tis better political strategy to claim it than to hold out oneself as an enemy of a cherished right. It is one thing to recognize that free speech

dissenter seems just as plausible as the marketplace of ideas metaphor, particularly when one remembers that commercial advertising went without constitutional protection for more than a century and a half without public complaint—a result that is hard to fit with a marketplace model. If one is to contemplate a thinking public, one would have to recognize that the laissez-faire principle is not accepted by it. The public opposed constitutional protection for flag burning. In discussing that issue, President Bush referred to a dissenter model, not a marketplace model: “As President, I will uphold our precious right to dissent, but burning the flag goes too far and I want to see that matter remedied.” Robin Toner, *President to Seek Amendment to Ban Burning the Flag*, N.Y. TIMES, June 28, 1989, at B7. Presumably, the public would support aspects of many of the standard exceptions to First Amendment protection. Thus, the public, however it divides on free speech issues, already holds complicated views on those issues. If simplicity is deemed a virtue in Schauer’s model, that feature is entitled to little weight.

167. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

168. Advertisers of vices receive little protection from the courts. See *United States v. Edge Broadcasting*, 113 S. Ct. 2696 (1993) (gambling); *Posadas De Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) (gambling). First Amendment objections to regulation of tobacco advertising have been, and will continue to be, a regular feature of congressional hearings. See, e.g., *Tobacco Product Education and Health Protection Act*, 1990: *Hearing on S. 1883 Before the Senate Comm. on Labor and Human Resources*, 101st Cong., 2d Sess., pt. 2, at 114-32 (1990) (statement of Burt Neuborne); *id.* at 153-61 (statement of Morton H. Halperin and Barry W. Lynn); *id.* at 162-80 (statement of Floyd Abrams).

169. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980). Demonstrators, however, have no First Amendment right of access to shopping centers.

170. *CBS v. FCC*, 453 U.S. 367 (1981); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), *reaff’d* in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

171. See *R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538 (1992) (suggesting that regulations aimed at racial harassment—whether by speech or conduct—might be constitutional).

interests conflict with other important values in a variety of important contexts and that in some of those contexts, free speech values are outweighed, or best interpreted not to apply. It is quite another to attack the free speech principle itself. Some version of the former is necessary for anyone who *thinks* about free speech. The latter promises to guide the left into outer darkness.

